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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA COMMUNITY ACTION ON TOXICS and ALASKA CHAPTER OF THE SIERRA CLUB, Plaintiffs, vs. AURORA ENERGY SERVICES, LLC and ALASKA RAILROAD CORPORATION, Defendants.	Case No. 3:09-cv-00255-TMB **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** **FED. R. CIV. P. 56**

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INTRODUCTION

As detailed in prior briefing, Defendants have complied fully with the Clean Water Act. Indeed, it is undisputed that Defendants have done what has been asked of them by the U.S. Environmental Protection Agency ("EPA") and the Alaska Department of Environmental Conservation ("DEC"), whose views are entitled to deference. As discussed below, Plaintiffs offer nothing to refute those conclusions. Defendants are thus entitled to summary judgment.

ARGUMENT

I. DEFENDANTS ARE NOT LIABLE FOR COAL SEDIMENT DISCHARGES.

To avoid summary judgment on their first claim, Plaintiffs must show that (i) EPA and DEC's reading of the General Permit as covering coal sediment discharges is not rational; (ii) the Clean Water Act's permit shield is inapplicable; (iii) Plaintiffs did not need to petition EPA before bringing a judicial challenge to coverage under the General Permit; ***and*** (iv) Plaintiffs' case is not moot even though an individual permit would yield the same controls. Plaintiffs have made none of these showings.

A. The Stormwater Plan and General Permit Cover Coal Sediment.

Plaintiffs ignore the Stormwater Plan's clear language. The very provision that Plaintiffs cite[1] lists Drainage Area H as the "[c]onveyor over water and shiploader,"[2] identifies "coal" as the "[s]uspected [p]ollutant,"[3] and describes a "control" as "[w]ipers on [the] conveyor belt to *prevent coal* on the return trip."[4] The Stormwater Plan also prescribes "[e]rosion and [s]ediment [c]ontrols" required "to prevent ***coal*** from entering the bay."[5] These controls include a scraper to

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[1] Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment ("Plfs' Opp'n Br.") at 11.

[2] Ashbaugh Decl., Ex. I (Stormwater Plan) at 11, ARRC00001913.

[3] *Id.*

[4] *Id.* (emphasis added); *see also, id.* at 43-44 (Figures 4 and 5 depicting Area H and noting "Wipers on the Return Belt").

[5] *Id.* at 20, ARRC00001922.

"scrape the belt of residual coal and prevent carry back."[6] Understandably, EPA and DEC interpret the Stormwater Plan and the General Permit to cover coal sediment discharges.[7] Plaintiffs ignore EPA and DEC's views and simply assume their own conclusions, *i.e.* that (i) coal sediment is not stormwater, and (ii) non-stormwater cannot be covered in the General Permit. Neither conclusion has support. The agencies reasonably determined that the General Permit covers coal sediment.

1. The Agencies Could Rationally Find That Stormwater Includes Coal Sediment.

Plaintiffs cannot substantiate their unsupported and conclusory assumption that coal sediment discharges are non-stormwater.[8] Coal on the conveyor (and elsewhere) contains snow, snowmelt and rainwater because the mine where coal originates, the railcars that transport coal, and the storage piles are open to the elements. Rain and snowmelt on the conveyor can, on occasion, flow down the belt, causing coal sediment to back up.[9] Moisture also can cause the coal to cling to the returning conveyor belt.[10] Thus, precipitation and coal sediment discharges are inextricably linked, and the agencies could rationally treat coal sediment as a component of stormwater.

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[6] *Id.* at 20. Plaintiffs' assertion "[t]hat there is no discussion anywhere in the Stormwater Plan of non-stormwater discharges from the conveyor, shiploader or 'Drainage H'" is patently incorrect. Plfs' Opp'n Br. at 11.

[7] *See* Defendants' Motion for Summary Judgment ("Defs' Brief") at 18-19 (citing, *inter alia,* Kent Decl., ¶¶ 8, 11); Ashbaugh Decl., Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report) (detailing operations and coal sediment controls without identifying any violations or permitting issues).

[8] *See* Plfs' Opp'n Br. at 3-5.

[9] Stoltz Supp Decl. ¶ 8; *see also* Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment ("Plfs' Br.") at 15 (admitting that coal is "regularly wetted at the facility… as a result of precipitation").

[10] Stoltz Supp Decl. ¶ 7.

2. The Agencies Could Rationally Cover Coal Sediment As Non-Stormwater.

EPA and DEC could also rationally cover coal sediment as non-stormwater. Plaintiffs misread the Clean Water Act regulations:[11]

> The general permit may be written to regulate ***one or more categories*** or subcategories of discharges . . . . where the sources within a covered subcategory of discharges are either: (i) Storm water point sources; or (ii) One or more categories or subcategories of point sources other than storm water point sources . . . .[12]

EPA thus has discretion to cover both stormwater and non-stormwater in the same permit.

Moreover, Plaintiffs' allegation that sections 1.1.2, 1.1.3 and 2.1.2.10 of the General Permit *ban* non-stormwater discharges is based on a crabbed, out-of-context reading.[13] First, Plaintiffs' construction would render superfluous language prohibiting certain "non-stormwater" discharges for various regulated sectors.[14] If the General Permit banned all non-stormwater discharges, the permit's drafters would have had no reason to ban specific types of non-stormwater discharges.[15] A more reasonable interpretation is that the lists of allowed stormwater and non-stormwater discharges are not exclusive.

Second, Plaintiffs' reading ignores Seward Terminal's Sector AD status. Sector AD is a catch-all category encompassing facilities not otherwise classified under the General Permit.[16] When EPA created Sector AD, it explained that "[t]he [Stormwater Plan] requirements for this sector are the same as in the baseline general permit to ***ensure flexibility*** given the broad

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[11] Plfs' Opp'n Br. at 6.

[12] 40 C.F.R. § 122.28(a)(2) (emphasis added).

[13] Plfs' Opp'n Br. at 4.

[14] *See, e.g.,* Ashbaugh Decl., Ex. M (General Permit) at § 8.C.2.1 (prohibiting certain non-stormwater discharges from Sector C (Chemical and Allied Products Manufacturing, and Refining)); *see also id.* at §§ 8.G.2.2, 8.H.2, 8.K.3.1.

[15] *See Envtl. Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 844 (9th Cir. 2003) (articulating the "bedrock principle that statutes not be interpreted to render any provision superfluous"); *see also Coyle v. P.T. Garuda Indonesia*, 363 F.3d 979, 985 (9th Cir. 2004) (declining to interpret a government-issued permit in a way that would create surplusage).

[16] 63 Fed. Reg. 52430 (September 30, 1998).

universe of potential types of facilities which may be covered."[17] The General Permit demonstrates this flexibility by omitting additional permit language describing what discharges are allowed or prohibited under Section AD,[18] and defers such matters either to the agency's response to the facility's Notice of Intent or to the development of the Stormwater Plan.[19] In light of the additional non-stormwater restrictions imposed upon other sectors,[20] it is notable that EPA chose not to impose any such specific restrictions on Defendants, despite its documented awareness of coal sediment discharges.[21]

B. The Clean Water Act's Permit Shield Prevents Liability.

Irrespective of whether EPA and DEC were authorized to cover coal sediment under the General Permit, Defendants are entitled to the statute's "permit shield" because these discharges were disclosed to the permitting agencies[22] and the agencies intended them to be covered. The Supreme Court has held that the permit shield "***relieve[s] [permittees] of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality.***"[23] This is precisely Defendants' situation. Plaintiffs disagree with EPA and DEC's position that the General Permit covers coal sediment.[24] But the permit shield protects Defendants in a Clean Water Act citizen suit over an agency's permitting approach.

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[17] *Id.* at 52443 (emphasis added).

[18] Ashbaugh Decl., Ex. M (General Permit) at 144, ARRC00018879.

[19] *Id*.

[20] *See* n.14, *supra*.

[21] *See* Defs' Br. at 16-20.

[22] 33 U.S.C. § 1342(k); see also Defs' Brief at 16-22.

[23] *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138, n.28 (1977) (emphasis added); *see also Coon ex rel. Coon v. Willet Dairy, LP*, 536 F.3d 171, 173 (2d Cir. 2008) (noting that permit shield "protects a CWA permit holder from facing suits challenging the adequacy of its permit").

[24] *See* Plfs' Opp'n Br. at 9-10.

Plaintiffs' only argument against the permit shield is their assertion that coal sediment is "explicitly excluded" from coverage under the General Permit.[25] This argument is neither accurate nor sufficient to circumvent the permit shield. First, as detailed in past briefing and Section I(A), *supra*, the Stormwater Plan (and thus the General Permit) explicitly *includes* coal sediment. Second, EPA and DEC indisputably interpret the General Permit to cover coal sediment.[26] The very purpose of the permit shield is to allow permittees to rely on such an interpretation (whether or not correct) and be protected from liability.

Even if coal sediment discharges were not explicitly covered under the General Permit, the permit shield would apply because Defendants disclosed their discharges to the agencies both during and after the permit application process[27]—a fact that Plaintiffs make only a token effort to contest. Plaintiffs inexplicably declare that Defendants "have not established that EPA had a copy of the Stormwater Plan," one sentence after acknowledging that the Stormwater Plan was provided to EPA in May 2009 before General Permit coverage became effective.[28] Plaintiffs then suggest that Defendants have the burden of proving that EPA "contemplated [the] content" of the Stormwater Plan prior to approving coverage.[29] This is nonsense. Defendants' duty under the permit shield is to *disclose* its discharges,[30] not to ensure that EPA ruminates over them.

Finally, Plaintiffs assert that even if EPA considered coal sediment discharges, the Stormwater Plan does not disclose them. To the contrary, the Stormwater Plan not only anticipates such discharges, it mandates specific responses.[31] Moreover, the *Piney Run* disclosure requirements encompass not just the permit application process, but other knowledge

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[25] Plfs' Opp'n Br. at 8.

[26] Kent Decl. at ¶¶ 8, 11; *see also* n.7, *supra*.

[27] *See Piney Run Pres. Ass'n v. Cnty. Comm'rs*, 268 F.3d 255, 271 (4th Cir. 2001).

[28] Plfs' Opp'n Br. at 15.

[29] *Id.*

[30] *See Piney Run*, 268 F.3d at 269.

[31] *See* Section I(A), *supra*; Defs' Br. at Section 17; Defs' Opp'n Br. at 9-11.

of the discharge.[32] EPA has known about these discharges since at least 1987, when an EPA diver observed that a "survey of [the] bottom [of the Bay under the loading dock] revealed uniform coverage by coal (***probably spilled from the loading conveyor belt***)."[33] As noted above, coal sediment was explicitly acknowledged in more recent inspections, without any mention that such discharges were unpermitted.[34] Plaintiffs have no basis to dispute that EPA and DEC knew about these discharges and intended their coverage.[35] Moreover, the statute's permit shield provision applies irrespective of the type of NPDES permit the agency chooses to apply.[36] The permit shield thus bars liability for Defendants, who fully complied with their permit obligations.

C. Plaintiffs Failed to Exhaust Their Administrative Remedy.

Even if coal sediment discharges were improperly covered, Plaintiffs' first claim is not justiciable because they failed to exhaust their administrative remedies.[37] Plaintiffs argue that administrative exhaustion "cannot trump" a citizen suit, and that compliance with the 60-day notice requirement in the citizen suit provision of the Clean Water Act "satisf[ies] any exhaustion requirements" and is the "only required procedure prior to bringing this citizen suit."[38] Plaintiffs' overstatement ignores the fact that different administrative remedies cover different circumstances: the 60-day notice provision may satisfy the exhaustion requirement for a lawsuit alleging a "violation of an effluent standard or limitation[,]"[39] but it does *not* satisfy the

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[32] *See Piney Run*, 268 F.3d at 271-72 (discharge monitoring reports provided to the permitting agency *after* permit issuance were relevant to what was within agency's "reasonable contemplation" and, thus, to the permit shield).

[33] Ashbaugh Decl. Ex. B, at 6 (emphasis added). Thus, Plaintiffs' claim that "the report does not discuss or contemplate *any* discharges from the conveyor into the Bay" is demonstrably false. *See* Plfs' Opp'n Br. at 13 (emphasis in original)

[34] Defs' Br. at 18-19; *see also* Ashbaugh Decl., Ex. BB (February 19, 2010 APDES Inspection Report); Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report) (detailing facility operations and controls without identifying any violations or permitting issues).

[35] *See e.g.* Kent Decl. at ¶ 11.

[36] 33 U.S.C. § 1342(k).

[37] *See* Defs' Br. at 22-23.

[38] Plfs' Opp'n Br. at 19.

[39] 33 U.S.C. § 1365(a)(1).

exhaustion requirement if, as here, the citizen suit challenges an agency action.[40] Not surprisingly, none of their cited cases support their overbroad contention.[41]

Plaintiffs try to avoid *Amigos Bravos* by protesting that they are not challenging the adequacy of the General Permit but rather "unpermitted discharges" of coal sediment.[42] Yet in *Amigos Bravos*, the plaintiffs also challenged "unpermitted" discharges that had been disclosed to the agency.[43] Here, Plaintiffs' argument fails because coal sediment discharges were disclosed to the agencies and are covered by the Stormwater Plan and the General Permit. No matter how Plaintiffs characterize their lawsuit, it seeks to force a "discharger authorized by a general permit to apply for and obtain an individual NPDES permit."[44]

Plaintiffs also claim that they should not be required to exhaust administrative remedies because coverage under the General Permit was never subject to public notice and comment.[45] But the administrative remedy at issue, much like the Stormwater Plan implementing the General

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[40] *See, e.g., Amigos Bravos v. Molycorp, Inc.*, No. 97-2327, 1998 WL 792159 (10th Cir. Nov. 13, 1998) (unpublished); *see also Natural Res. Def. Council v. U.S. E.P.A.*, 806 F. Supp. 1263, 1278 (E.D. Va. 1992), *aff'd sub nom.*, *Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 16 F.3d 1395 (4th Cir. 1993) (requiring exhaustion before bringing citizen suit); *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1092 (E.D. Cal. 2008) (recognizing exhaustion could be required in environmental citizen suit); *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1174 (9th Cir. 1979) (failure "to pursue [administrative remedies] within the applicable time limitations does not now entitle them to a remedy in a federal forum"); *Action for Rational Transit v. W. Side Highway Project*, 699 F.2d 614, 616-17 (2d Cir. 1983) (failure to exhaust administrative and state law remedies barred citizen suit).

[41] Only one of the cases cited by Plaintiffs, *Citizens for a Better Environment-California v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996), even addresses exhaustion of administrative remedies in the context of a Clean Water Act citizen suit. There, the court found that the citizen suit in question did not seek the same remedy as the state administrative procedure that was alleged not to have been exhausted. *Id.* at 1119. The administrative remedy available here—reconsideration of the use of a general permit—is precisely the relief Plaintiffs seek in this lawsuit. Most of Plaintiffs' remaining cases have nothing at all to do with exhaustion, and merely stand for the unremarkable proposition that citizen suits "perform an important public function." *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987).

[42] Plfs' Opp'n Br. at 17-18.

[43] 1998 WL 792159, at *1.

[44] *See* 40 C.F.R. § 122.28(b)(3)(i).

[45] Plfs' Opp'n Br. at 17, n.9.

Permit,[46] has been continuously available. At any time after EPA approved coverage, Plaintiffs could have petitioned EPA—or later, DEC—to require an individual permit.[47] Had Plaintiffs done so, the expert agency could have evaluated that petition and, in so doing, created a record upon which a court could review the rationality of the agency's decision—a key purpose of exhaustion.[48] Had EPA or DEC rejected Plaintiffs' petition, Plaintiffs' recourse would have been to seek judicial review of that agency action, not to bring a citizen suit against Defendants, who have complied with the General Permit and the Stormwater Plan.

D. Plaintiffs' First Claim Is Moot Because Existing BMPs Under the General Permit Already Provide the Same Relief as an Individual Permit.

Plaintiffs' first claim is moot: under the General Permit, Defendants are already implementing the best management practices ("BMPs") that a hypothetical individual permit would require.[49] Plaintiffs do not contest that the General Permit requires Defendants to deploy BMPs to control coal sediment discharges,[50] nor that EPA must impose BMPs to control discharges when, as here, "numeric effluent limitations are infeasible."[51] Moreover, under an

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[46] Plaintiffs received a copy of the draft Stormwater Plan well before it was submitted to EPA. *See* Defs' Opp'n Br. at 11, n.60. In addition, the General Permit requires Defendants to make a copy of the Stormwater Plan publicly available at their facility. Ashbaugh Decl., Ex. M (General Permit) at 36, ARRC00018771.

[47] Section 122.28(b)(3) identifies circumstances where an individual permit may be required, including where, based on a fact-specific inquiry, "[t]he discharge is a significant contributor of pollutants," as Plaintiffs assert here. Nothing in section 122.28(b)(3) suggests another remedy or indicates that one should be able to bring such a contention directly to court. *See* Defs' Br. at 22-23. To the contrary, EPA provides a carefully crafted regulatory mechanism enabling parties to petition EPA if they believe General Permit coverage is inappropriate.

[48] *See Weinberger v. Salfi,* 422 U.S. 749, 766 (1975) (exhaustion required to prevent interference with agency processes, allow efficient agency functioning and self-correction, obtain benefit of agency experience and expertise, and compile a record for judicial review).

[49] *See* Defs' Br. at 24-25; Defs' Opp'n Br. at 8.

[50] *See* Ashbaugh Decl., Ex. M (General Permit) at 17, ARRC00018752 ("control measures" include BMPs); *see also* Kent Decl., ¶ 10 (both general and individual permit "would require implementation of reasonable measures designed to limit discharges of coal").

[51] 40 C.F.R. § 122.44(k)(3); *see also* 18 AAC 83.475. Plaintiffs coyly assert that use of BMPs rather than numerical standards applies only in "certain limited situations" challenging Defendants to "prove" numeric effluent limitations infeasible. *See* Plfs' Opp'n Br. at 24. While this is a difficult negative to prove, one could imagine a numeric limit requiring a full-time "coal watcher" monitoring coal falling from the conveyor and a diver retrieving and weighing that coal. (The diver would need to be able to distinguish "fresh" coal deposits.) Plaintiffs suggest no other numeric effluent limitation mechanism.

individual permit, BMPs would be developed by AES (as they have been under the Stormwater Plan), not by the permitting agency.[52] Because there is no functional difference between the current permitting regime and what would be imposed under the individual permit that Plaintiffs demand, Plaintiffs' first claim should be dismissed as moot.

II. THE SEWARD TERMINAL IS NOT REQUIRED TO HAVE AN ADDITIONAL CLEAN WATER ACT PERMIT FOR WIND-BORNE DUST.

Plaintiffs cannot demonstrate a "discernible, confined and discrete conveyance" of wind-borne dust to Resurrection Bay. Even if they could, the Seward Terminal's General Permit already provides the appropriate measures to control dust. Accordingly, Plaintiffs' second claim should be dismissed.

A. Wind-Borne Dust is Not Discharged from a Point Source.

Under the Clean Water Act's plain language, only discharges from a "point source" require a permit.[53] The definition of "point source" contains two core elements: (i) a conveyance (*i.e.*, "a means or a way of conveying: as in . . . a means of transport"[54]); and (ii) a requirement that the conveyance be "discernible, confined and discrete."[55] Plaintiffs cannot show these elements[56] and instead argue that it is enough that dust originates at "specific,

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[52] *See* Guidance Manual for Developing Best Management Practices (BMPs), EPA No. 833-B-93-004 (October 1993) at 1-1 ("The purpose of this manual is to provide guidance to ***NPDES permittees*** in the development of BMPs for their facilities.") (emphasis added).

[53] 33 U.S.C. §§ 1311, 1362(12).

[54] Merriam-Webster's Collegiate Dictionary 273 (11th ed. 2003); *see also* Oxford English Dictionary (2d ed. 1989; online version June 2012), *available at* OED Online ("II. A way or means of conveying. 12. A conducting ***way, passage, or channel***. . . . b. A ***channel*** for conveying water, steam, smoke, electricity, etc. . . . 13. A means of transport from place to place, a carriage, a vehicle") (emphasis added); Black's Law Dictionary 383 (9th ed. 2009) ("5. A means of transport; a vehicle").

[55] *See* 33 U.S.C. § 1362(14).

[56] Plaintiffs' own expert characterized dust from the facility as a "fugitive emission"—the Clean Air Act equivalent of a *nonpoint* source. *See* Ashbaugh Decl., Ex. N (Deposition of Steven E. Klafka or "Klafka Dep.") at 131:13-15 ("fugitive emission" is "an emission that's not contained or easily contained and so it is released ***in a broad area as opposed to a stack or a vent***") (emphasis added).

discernible ***locations***"[57] and disperses "via wind."[58] In fact, the statute requires a "discernible, confined and discrete ***conveyance***"[59] to water.[60] Even were the statute less clear, case law and EPA guidance instruct that wind-borne dust is not a point source discharge.

1. Plaintiffs Cannot Evade the Point Source Requirement.

Unable to establish the point source criteria that stormwater cases uniformly require, Plaintiffs dismiss stormwater cases wholesale[61] and ignore that wind is a "natural force" precisely analogous to stormwater.[62] Plaintiffs evidently would require a discernible, confined, and discrete conveyance on days when rain at the Seward Terminal caught dust particles and swept them in stormwater flows toward the Bay, but not on clear days when wind did precisely the same thing. Nothing in the statute or case law supports such a distinction.

Stormwater or no, the question is whether a pollutant "is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches,

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[57] Plfs' Opp'n Br. at 39. Plaintiffs list a number of "locations," including bulldozers, as ostensible point sources. *Id*. at 37, 39. However, Plaintiffs have never properly alleged that bulldozers are a point source of wind-borne dust. *See* Docket #1 (Compl., ¶¶ 61, 62). Plaintiffs cannot do so only now in opposing summary judgment. In any case, Plaintiffs' proffered support for claiming bulldozers as point sources is of no avail. *See* Plfs' Opp'n Br. at 37, n.25 (citing *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001)). In *Borden Ranch*, bulldozers were point sources because they "were used to pull large metal prongs through the soil" so as to redeposit soil in a wetland. 261 F.3d at 815. That a bulldozer (or other equipment) may generate dust does not make it a point source absent a "discernible, confined and discrete conveyance" transporting the pollutant to water. Thus far, Plaintiffs have not alleged that Defendants use bulldozers to push discernible and confined air currents bearing coal dust particles into Resurrection Bay.

[58] Compl., ¶ 63.

[59] *Cf*. 33 U.S.C. § 1362(14) (listing examples of "discernible, confined and discrete conveyances," as opposed to mere locations, including "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged").

[60] *See, e.g.*, *Trs. for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (distinction between point source and nonpoint source turns on "whether the pollution ***reaches the water*** through a confined, discrete ***conveyance***.") (emphasis supplied).

[61] *See* Plfs' Opp'n Br. at 37-44.

[62] *See id.* at 38-39.

culverts, channels, and similar conveyances (and is thus a point source discharge.)."[63] Although pollutant conveyances outside of the stormwater context may not be through "ditches, culverts, [or] channels," the key issue is whether the pollutant dissipates naturally or is conveyed in a discernible, confined and discrete manner or, for lack of a better term, through "channelization." Characterization of a point source as "channelized" indeed occurs in cases outside the stormwater context, including in cases where pollutants are discharged through the air. [64] Regardless of the activity, "[t]he text of [the Clean Water Act] and the case law are clear that some type of collection or channeling is required to classify an activity as a point source."[65] Plaintiffs cite nothing demonstrating that wind-borne dust has been channelized in any way.

EPA's 1987 *Nonpoint Source Guidance* not only belies Plaintiffs' attempt to distinguish stormwater from wind-borne dust, but it confirms that the latter does not qualify as a point source discharge. In insisting that "channelization" is only relevant to rainfall-based pollution, Plaintiffs for a second time ignore that the very EPA guidance they cite (and misquote) directly refutes their position. EPA's guidance demonstrates unequivocally that both unchannelized stormwater runoff and ***atmospheric deposition of dust*** are classic forms of ***nonpoint*** pollution.[66]

Plaintiffs also attempt to evade the point source requirement by contending that wind-borne dust differs from stormwater because dust is a "direct discharge."[67] Yet Plaintiffs actually concede that wind-borne dust is not a direct discharge: "[C]oal dust becomes airborne and

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[63] *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1071 (9th Cir. 2011).

[64] *See*, *e.g.*, Defs' Br. at 36-37, citing *Stone v. Naperville Park Dist.*, 38 F. Supp. 2d 651, 655 (N.D. Ill. 1999) ; *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009).

[65] *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2011) (addressing groundwater seepage) ("[P]oint and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance."), citing *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984).

[66] *See* Mayberry Decl., Ex. F at 7 (EPA Office of Water, *Nonpoint Source Guidance* 3 (1987)) ("[N]onpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, ***atmospheric deposition***, or percolation.") (emphasis added); *see also* Plfs' Br. at 27; Plfs' Opp'n Br. at 40, n.30 (misquoting guidance).

[67] Plfs' Opp'n Br. at 38, 41. Notably, the definition of "point source" does not include Plaintiffs' invented term "direct discharge."

transported ***via wind*** before it settles into the water."[68] Indeed, Plaintiffs' case law purportedly illustrating "direct[] flow[] into navigable water[]" only confirms that a point source is required.[69] Like stormwater, wind-borne dust must be channelized via a "discernible, confined and discrete conveyance" for it to constitute point source pollution.

2. Like Unchannelized Stormwater, Wind-Borne Dust is Not Discharged From a Point Source Because it is the Result of Natural Forces.

Plaintiffs argue that human control over a pollutant's conveyance is not necessary to find a point source.[70] Yet they themselves point out that case law has treated runoff from precipitation as nonpoint pollution because "courts and regulators have been reluctant to hold individuals liable for the effects of ***purely natural events*** (i.e., stormwater run-off where there is ***no effort to convey that run-off through channels or ditches***)."[71] Evidently, Plaintiffs concede that the Clean Water Act addresses channelized, directed conveyances as opposed to unimpeded natural occurrences.[72]

Despite having acknowledged the need for some human direction or channelization, Plaintiffs argue that the statute's implementing regulations limit any channelization requirement to stormwater.[73] This argument mischaracterizes EPA regulations, whose reference to channelization of stormwater discharges simply articulates the fundamental statutory requirement for point sources: a ***conveyance***.[74] The requirement that stormwater specifically be "collect[ed] and convey[ed]" merely speaks to how stormwater becomes a "discernible, confined

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[68] *See*, *e.g.*, Plfs' Br. at 28 (emphasis supplied).

[69] *See* Plfs' Opp'n Br. at 38-39, n.29 (discussing *Cordiano*, 575 F.3d at 223) (citing *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994))).

[70] Plfs' Opp'n Br. at 45-48.

[71] *Id*. at 39 (emphasis added).

[72] Plaintiffs mischaracterize Defendants' argument as contingent on the intentional or accidental nature of a discharge. *See* Plfs' Opp'n Br. at 45; *cf.* Defs' Br. at 31-34, 37-39. What matters is whether there is a "discernible, confined and discrete conveyance," as opposed to unimpeded and diffuse rain, wind, or other purely natural force. Only the latter is present here.

[73] Plfs' Opp'n Br. at 46.

[74] *See* 40 C.F.R. §§ 122.2 (defining "discharge of a pollutant"), 122.26(b)(14).

and discrete" conveyance.[75] In the case of wind-borne dust, Defendants have neither collected nor conveyed dust—much less done so in any "discernible, confined and discrete" manner. The regulations only reinforce the lack of a point source here.

In an attempt to prove human involvement, Plaintiffs observe that Defendants own and operate a facility where activities create dust.[76] But courts have required that Clean Water Act plaintiffs prove something more, *i.e.,* control over *specific pathways* by which a pollutant is conveyed and travels to water.[77] The wind-borne dispersion of dust is precisely the kind of "uncontrolled natural phenomenon"[78] over which Defendants have no control. The fact that Defendants control the equipment use that sometimes generates dust does not mean they control the natural forces that may carry the dust to water.

Plaintiffs' attempt to undermine Defendants' case law analysis only reinforces that wind does not create a point source.[79] Plaintiffs reference but do not discuss *Greater Yellowstone Coalition*, which recognizes that pollution from ***any*** source requires "some type of collection or channeling" in order to be regulated.[80] Likewise, in *Abston Construction Co.*, the court's decision was qualified by the threshold requirement that there be some channelized drainage system or other discrete conveyance over which the facility exercised control.[81] In *Friends of Santa Fe*, the court again recognized the relevance of human control over a conveyance. In

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[75] *See Cordiano*, 575 F.3d at 221.

[76] *See* Plfs' Opp'n Br. at 46, 48.

[77] *See*, *e.g.*, Defs' Brief at 32-34 (citing *Abston Constr. Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980); *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1071; *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 803 F. Supp. 2d 1056, 1063 (N.D. Cal. 2011).

[78] Pls. Opp'n Br. at 48.

[79] *See* Plfs' Opp'n Br. at 45-46 (identifying *Greater Yellowstone Coal.*, 628 F.3d 1143, *Abston Constr. Co.*, 620 F.2d 41, and *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995)); *see also* Plfs' Opp'n Br. at 47-48.

[80] 628 F.3d at 1152-53 (groundwater seepage lacking "confinement or containment" was not a point source).

[81] *Sierra Club v. Abston Constr. Co.,* 620 F.2d 41, 45 (5th Cir. 1980) (holding that "discharges into a navigable body of water ***by means of ditches, gullies and similar conveyances***" and "[c]onveyances of pollution formed either as a result of natural erosion or by material means, ***and which constitute a component of a mine drainage system***, may fit the statutory definition" where "pollutants were discharged from '***discernible, confined, and discrete conveyance[s]***') (emphasis added). *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1321 (D. Or. 1997), on which Plaintiffs rely, is inapposite. The *Umatilla* court noted that "residual

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finding that seeps containing acid mine drainage were *not* point sources, the court emphasized that "[d]efendants had nothing to do with their creation."[82] In sum, the case law confirms that natural forces alone cannot create a point source; there must be a "discernible, confined and discrete conveyance."[83]

3. Wind-Borne Dust Is Unlike Aerial Spray Because it Is Not Discharged to Water from a Discernible, Confined and Discrete Conveyance.

Plaintiffs' strained attempt to analogize wind-borne dust to aerial spraying mischaracterizes the case law.[84] The aerial spray cases and this case share just one commonality: pollutants fall to water from the air. Permit applicability, however, does not turn on transport media (air vs. land vs. water), but on the existence of a "discernible, confined and discrete conveyance." Each of the aerial spray cases discussed by Plaintiffs involved purposeful, directed discharge of pollutants from some vehicle, through some apparatus, reflecting the "channelization" necessary to create a point source.[85] Whether or not the operator of the channelizing device intended that the chemicals fall to water, the operator indisputably intended

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pollutants purposefully collected" that seeped directly into groundwater could constitute a point source if the groundwater were subject to Clean Water Act jurisdiction. *Id*. at 1321. In any case, if this dicta supported Plaintiffs, it would have been superseded by *Greater Yellowstone*, which held that unchannelized seepage is not point source pollution. 628 F.3d at 1153.

[82] 892 F. Supp. at 1359. The district court's *dicta* identification of the overburden pile in *Friends of Santa Fe* as a point source is not to the contrary, as these discharges were channelized through a manmade system. *See* Defs' Br. at 39, n.199.

[83] Both the Clean Water Act and its regulations require *human involvement* to effect a point source discharge. *See* 42 U.S.C. §1311(a) (prohibiting the unpermitted "discharge of any pollutant ***by any person***") (emphasis added); 40 C.F.R. § 122.2 (defining "discharge of a pollutant" to include "additions of pollutants. . .from: surface runoff which is collected or channeled ***by man***, discharges through pipes, sewers, or other conveyances. . . ." (emphasis added).

[84] *See* Plfs' Opp'n Br. at 42-44; *cf.* Defs' Br. at 35-36; Defs' Opp'n Br. at 22-23.

[85] *See generally League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002); *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180 (2d Cir. 2010); *No Spray Coal., Inc. v. City of N.Y.*, No. 00 Civ. 5395 (GBD), 2005 WL 1354041 (S.D.N.Y. Jun. 8, 2005). The aerial spray cases are better analogized to a wastewater discharge pipe that is above the surface of the water. A discharger could not avoid permitting simply by raising the elevation of the pipe such that the liquid discharge falls through the air before hitting the water. But this is very different from dust caught by natural forces and transported by an "unchannelized" conveyance.

and directed the discharges themselves. The lack of any such intent, direction or control with respect to wind-borne coal dust from the Seward Terminal stands in stark contrast.

Plaintiffs are wrong to downplay the relevance in the aerial spray cases of the spray occurring directly over water.[86] For example, in determining that each point source element had been met in *Forsgren*, the Ninth Circuit specifically held that "aircraft spray these insecticides ***directly into rivers***."[87] Again, in *Peconic Baykeeper*, the fact of discharge directly over water was dispositive.[88] Finally, the precise issue that remained for the court in *No Spray Coalition* was, in fact, "whether the spraying of insecticides ***directly over the rivers, bays, sound and ocean*** . . . would violate the Clean Water Act."[89] Thus, central to each of these cases was the fact that discharges occurred *over water*. With respect to dust at the Seward Terminal, no directed discharge to water has taken place.

Each of the aerial spray cases relied on by Plaintiffs involved a "discernible, confined and discrete conveyance."[90] It ultimately does not matter whether the point source is characterized as the specific apparatus responsible for the discharge or the broader vessel to which the apparatus

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[86] Pls. Opp'n Br. at 43-44.

[87] 309 F.3d at 1185 (emphasis added); *see also id*. at 1185, n.4 (discussing support for finding that "the discharge of pollutants from aircraft over navigable waters [are] point source discharges"). Plaintiffs' contrary assertion that "the Forest Service was enjoined from its spraying activities . . . because an indirect result of spraying the Forests would be the discharge of pollutants into waters of the U.S." is patently incorrect. *See* Plfs' Opp'n Br. at 43. *Forsgren* did address incidental pesticide drift from areas over land to water, but ***only*** in the context of the plaintiffs' National Environmental Policy Act claims. 309 F.3d at 1191-92.

[88] *See* 600 F.3d at 187. The court held that an EPA rule then in effect barred Clean Water Act liability for FIFRA-compliant spraying, but remanded for further fact-finding on the question of "aerial spraying over creeks." *Id*. at 187-88. To the extent liability could have been imposed for point source discharge, it was *only* for those discharges directly over water. *Id.*

[89] 2005 WL 1354041, at *1 (quoting *No Spray Coal. v. City of N.Y.*, No. 00 CIV. 5395, 2000 WL 1401458, at *4 (S.D.N.Y. Sept. 25, 2000)) (emphasis added). The district court also restated its view that "[i]t would be stretching the language of the statute well beyond the intent of Congress to hold that the *de minimis* incidental drift over navigable waters of a pesticide is a discharge from a point source into those waters." *Id*. at *1, n.1 (quoting *No Spray Coal.*, 2000 WL 1401458, at *3).

[90] *Forsgren*, 309 F.3d at 1185 ("The statutory definition of point source . . . clearly encompasses an aircraft equipped with tanks spraying pesticide from mechanical sprayers directly over covered waters.") (internal citation omitted); *Peconic Baykeeper, Inc.*, 600 F.3d at 188 ("[T]he spray apparatus was attached to trucks and helicopters, and was the source of the discharge. The pesticides were discharged 'from' the source, and not from the air."); *No Spray Coal., Inc.*, 2005 WL 1354041, at *5 ("If the helicopters and trucks . . . conveyed pollutants from their original source to the navigable water, they most certainly constitute point sources.").

is attached. Either way, the pollutant stream was consciously and purposefully directed outside the vessel. Moreover, the concern that animated the court in *No Spray Coalition*—that purposeful, channelized conveyance might escape liability based on the type of apparatus (*i.e.*, pipe versus mist sprayer)—is not present here.[91] In fact, unlike *No Spray Coalition* (and other cases finding a point source), wind-borne coal dust is not released through any "single flow" at all.[92] In other words, it is not "channelized."[93] Airborne pollution that ends up in water—just like any other water pollution—must occur through "discernible, confined, and discrete" means in order to constitute a point source.[94]

B. The Agencies' Reasonable Interpretation is Entitled to Deference.

Even if this Court were to find that the Clean Water Act's provisions do not clearly indicate whether diffuse wind-borne dust emissions require an NPDES permit, EPA and DEC have answered that question emphatically in the negative. The Seward Terminal's history of inspections, coupled with other statements by both EPA and DEC, reflects both agencies' active interpretation that these emissions do not require an NPDES permit.[95] This conclusion accords with their approach to every other facility known to Plaintiffs' expert,[96] and with longstanding

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[91] 2005 WL 1354041, at *4.

[92] *Id*.

[93] Other cases cited by Plaintiffs similarly do not refute that directed channelization is required for airborne pollutants to qualify as point source pollution. *See U.S. Pub. Interest Research Grp. v. Atl. Salmon,* LLC, 215 F. Supp. 2d 239, 253 (D. Me. 2002) (merely rejecting the defendants' overly narrow reading of "point source" to specifically require a "discrete discharging ***pipe***" (as opposed to another form of discrete conveyance)); *United States v. W. Indies Transp.*, 127 F.3d 299, 309 (3d Cir. 1997) (contrasting pollution from deliberate activities on a vessel over water from case where "any discharge of material would not be deliberate or systematic").

[94] *See also*, *e.g.*, *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) ("[T]he words used to define [point source] and the examples given ('pipe, ditch, . . . etc.) evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways."); *Froebel v. Meyer*, 217 F.3d 928, 937-38 (7th Cir. 2000) ("[Point source] connotes the terminal end of an artificial system for moving water, waste, or other materials."); *U.S. Pub. Interest Research Group*, 215 F. Supp. 2d at 255, n.16 (citing *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club*, No. 94 Civ. 0436 (RPP), 1996 WL 131863, at *13 (S.D.N.Y. Mar. 22, 1996)) ("[A] trap shooting range designed to concentrate shooting activity from a few specific points, systematically directed in a single direction, is an identifiable source from which spent shots and target fragments are conveyed into navigable waters").

[95] Defs' Br. at 27-30 (discussing inspection activities and other expressions of the agencies' interpretation that an additional Clean Water Act permit is not required); Kent Decl., ¶¶ 11-12; Edwards Decl., ¶ 11 ("ADEC believes that

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Clean Water Act guidance explaining that atmospheric deposition is *not* point source pollution.[97] Thus, contrary to Plaintiffs' assertions, the agencies' conclusion reflects far more than mere "inaction."[98] It is an active, deliberate interpretation, long-held by EPA and consistently applied at the Seward Terminal and other facilities. Because both EPA and DEC have reasonably interpreted the Clean Water Act to require no additional permit, their interpretation is entitled to deference.[99]

Plaintiffs' attempt to avoid agency deference mischaracterizes the doctrine.[100] Just because a plaintiff is not categorically barred from citizen suit by virtue of an agency's conflicting view, this does not diminish the application of fundamental principles of deference in interpreting the statute.[101] To the contrary, the cited citizen suit cases invoke the very deference Plaintiffs seek to avoid.[102] As the court held in *San Francisco Baykeeper*:

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the SOPs and other control mechanisms and requirements of the Compliance Order . . . comply with applicable law governing airborne dust emissions from the Seward Coal Terminal."); Ashbaugh Decl., Ex. S (December 13, 2006 letter from EPA to Senator Ted Stevens) (informing Sen. Stevens that dust from the Seward Terminal is properly regulated under Alaska clean air regulations).

[96] *See* Ashbaugh Decl., Ex. N (Klafka Dep.) at 132:11-21 (Q: Are you aware of even one facility where fugitive air emissions that made their way into the air, traveled for a distance, fell to a surface water were in fact regulated by Clean Water Act NPDES permit? A: Not that I can recall.); *see also* Defs' Br. at 25.

[97] Mayberry Decl., Ex. F at 7 (EPA Office of Water, *Nonpoint Source Guidance* 3 (1987)); *see also* Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed Reg. 60,653, 60,655 (Oct. 23, 2003) (listing "atmospheric deposition" as "nonpoint pollution").

[98] Plfs' Opp'n Br. at 36.

[99] *See*, *e.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); *Wash. Dep't of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985) (An agency's reasonable interpretation is entitled to deference "even if the agency could also have reached another reasonable interpretation, or even if we would have reached a different result had we construed the statute initially."); *see also* Defs' Br. at 30.

[100] *See* Plfs' Opp'n Br. at 36 (citing *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002); *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007)).

[101] *See*, *e.g.*, *Cordiano*, 575 F.3d at 221 (applying *Chevron* deference to EPA's interpretation of "point source" in the Clean Water Act citizen suit context).

[102] *See*, *e.g.*, *Ass'n to Protect Hammersley*, 299 F.3d at 1019 (citing *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977)) (rejecting plaintiffs' allegation of point source discharge on the basis of EPA's exercise of its power to interpret the meaning of "point source" under the Clean Water Act); *San Francisco Baykeeper*, 481 F.3d at 706 (applying *Chevron* deference to the EPA and the Army Corps of Engineers' interpretation of "waters of the United States" under the Clean Water Act).

> [I]t is most appropriate to defer to the administering agencies in constructing the statutory term 'waters of the United States,' which establishes the reach of the CWA. Deference is especially suitable because this borderline determination . . . is one that involves 'conflicting policies' and expert factual considerations for which the agencies are especially well suited.[103]

In this case, this Court may substitute "point source" for "waters of the United States."

EPA and DEC have exercised their expertise in not requiring a Clean Water Act permit for wind-borne dust.[104] Plaintiffs have provided no basis for second-guessing this approach, especially when requiring a permit is sure to result in absurd and unfathomable implications for both regulators and industries—who, like Plaintiffs' expert, have never contemplated such coverage.[105] The consequences of accepting Plaintiffs' arguments extend not only to the coal industry, but also to myriad other activities that incidentally release dust, sand, gravel or other particulate matter that wind might transport to a water body.[106] Rather than "undermine or throw into chaos"[107] agencies' longstanding interpretation of the Clean Water Act, this Court should defer to their reasonable policy that a NPDES permit is not required.[108]

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[103] 481 F.3d at 706 (citing *Wash. Dep't of Ecology*, 752 F.2d at 1469); *see also Chevron*, 467 U.S. at 865.

[104] *See*, *e.g.*, Kent Decl., ¶¶ 7, 11-12; Mayberry Decl., Ex. F at 7 (EPA Office of Water, *Nonpoint Source Guidance* 3 (1987); Ashbaugh Decl., Ex. S (December 13, 2006 letter from EPA to Senator Ted Stevens).

[105] *See* Brief of *Amicus Curiae* National Mining Association in Support of Defendants at 8-13 (discussing the countless facilities that would suddenly find themselves subject to uncertain, costly, and unanticipated permitting requirements).

[106] *Id*. at 9-10 (citing *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1490 (10th Cir. 1997)); Defs' Br. at 40.

[107] *San Francisco Baykeeper*, 481 F.3d at 706.

[108] Using similar reasoning, a California federal court recently rejected an effort by a plaintiff to regulate particulate air emissions that fall to the ground through a Resource Conservation and Recovery Act ("RCRA") citizen suit. *See Ctr. for Cmty. Action and Envtl. Justice v. Union Pac. Corp.*, No. CV 11-08608SJO, 2012 WL 2086603, at *6 (C.D. Cal. May 29, 2012). ("[I]t is not for the Court to create a regulatory scheme where one does not exist or to apply a strained construction of RCRA to an area that Congress has chosen to regulate through the CAA.").

C. Wind-Borne Coal Dust Is Covered under the General Permit.

Even if a Clean Water Act permit were required, Plaintiffs cannot refute that the General Permit and Stormwater Plan address dust.[109] Plaintiffs, however, argue that the General Permit only extends to dust that migrates via stormwater after falling to the ground.[110] While it is true that the General Permit addresses wind-borne dust because it may migrate via stormwater, the General Permit's application to the wind-borne dust alleged here is a practical inevitability.[111] Indeed, Plaintiffs do not dispute that the measures designed to minimize dust that might migrate via stormwater are precisely the same measures that minimize wind-borne dust. Whether deposited first on land (and discharged via stormwater) or deposited initially in navigable water, it is the same dust.

D. Plaintiffs' Wind-Borne Dust Claim Is Moot.

Even if Plaintiffs could establish that a permit is necessary for wind-borne dust, Plaintiffs' second claim is moot because DEC brought an air enforcement action that imposed dust emissions controls and civil penalties; Plaintiffs have not demonstrated a "realistic prospect" of future violations; and the dust controls required by the air enforcement action are the same BMPs that a permit would impose.[112]

Plaintiffs argue that an enforcement action under the Clean Air Act can never moot a Clean Water Act citizen suit, but fail to present a compelling reason why the "realistic prospect" test articulated in *Environmental Conservation Organization v. City of Dallas*[113] cannot apply

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[109] *See* Plfs' Opp'n Br. at 13-14.

[110] *Id.* at 14.

[111] *See* Defs' Br. at 41-42 (indicating DEC's awareness that dust from the Seward Terminal is addressed under both the General Permit and Stormwater Plan).

[112] *See* Defs' Br. at Section III(C)(2).

[113] 529 F.3d 519 (5th Cir. 2008); *see also Atl. States Legal Found., Inc. v. Eastman Kodak, Co*., 933 F.2d 124, 127 (2d Cir. 1991); *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998).

here.[114] The touchstone of the mootness inquiry is *the probability of future violative conduct*.[115] Although DEC's enforcement action arose from the Clean Air Act and not the Clean Water Act, it penalized the ***exact same conduct*** targeted in this lawsuit. Nothing in *City of Dallas* and its brethren suggests the formalistic distinction between statutory regimes urged by Plaintiffs.[116]

The primary case cited by Plaintiffs, *No Spray Coalition*,[117] highlights the appropriateness of mootness analysis here. In *No Spray Coalition*, the court held that compliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) did not bar a Clean Water Act citizen suit.[118] As the Second Circuit noted, FIFRA primarily regulates labeling and usage of pesticides and has no citizen suit provision.[119] By contrast, the Clean Water Act is a pollution-control statute with a citizen suit provision—just like the Clean Air Act.[120] Moreover, the Clean Air Act remedies imposed here indisputably address the precise environmental concern raised by Plaintiffs—wind-borne dust migration from coal piles.

Finally, Plaintiffs argue that their claims cannot be mooted because their expert identifies dust control measures that they allege Defendants are not using. However, "[t]he fact that the

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[114] *See* Plfs' Opp'n Br. at 34. Because the Ninth Circuit has not yet considered the standard for mootness when a government enforcement action post-dates a citizen suit, Plaintiffs' argument that another standard applies is meritless.

[115] *See, e.g.*, *Comfort Lake*, 138 F.3d at 354 ("A claim for injunctive relief may become moot if challenged ***conduct*** permanently ceases.") (emphasis added).

[116] Plaintiffs also argue that a citizen suit can only be "precluded" by a judicial (as opposed to administrative) enforcement action. Plfs' Opp'n Br. at 31-33. But the cases cited by Plaintiffs concern *statutory jurisdiction* to bring a Clean Water Act citizen suit. By contrast, Defendants have argued that Plaintiffs' second claim is mooted because it no longer presents a case or controversy under Article III of the U.S. Constitution. Defs' Br. at 24, 42-47. More factually on-point is *Comfort Lake*, in which (contrary to Plaintiffs' representation) an *administrative* enforcement action constitutionally mooted *both* the injunctive relief *and* penalties sought by the citizen plaintiffs. 138 F.3d at 354-357; *see also Orange Env't, Inc. v. Cnty. of Orange,* 923 F. Supp. 529 (S.D.N.Y. 1996) (subsequently-filed EPA *administrative* compliance order moots citizen suit injunctive relief). Plaintiffs further demonstrate their confusion by arguing that they filed this citizen suit prior to the signing of the Compliance Order. Plfs' Opp'n Br. at 33. In fact, that is the whole point of constitutional mootness: a party loses its standing after a suit has been filed, due to subsequent events. *Williams v. I.N.S.,* 795 F.2d 738, 741 (9th Cir. 1986).

[117] *No Spray Coal. v. City of N.Y.,* 351 F.3d 602 (2d Cir. 2003).

[118] *Id.* at 605.

[119] *Id.* at 604-5.

[120] *See, e.g., Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987) (discussing similarities between both statutes' purposes and citizen suit provisions).

remediation order . . . does not meet the desires of the private parties is not crucial" to a mootness analysis.[121] Indeed, a hypothetical permit covering dust emissions would almost certainly require BMPs equivalent to the "reasonable precautions" that Plaintiffs' expert, Mr. Klafka, admits are already in place.[122] Even if additional remedial measures were relevant to the mootness inquiry, Mr. Klafka has never visited the Seward Terminal to determine whether such measures were reasonable for *this* facility.[123]

III. SNOW REMOVAL IS PROPERLY COVERED BY THE GENERAL PERMIT.

Plaintiffs appear to believe that if they just keep repeating that snow—which may or may not contain coal—is a non-stormwater discharge, this Court will ignore the law and common sense. Snow and snowmelt from the Seward Terminal, however, are stormwater and covered by the General Permit.

A. Any Alleged Coal-Laden Snow at the Seward Terminal is Stormwater.

Plaintiffs acknowledge that *snowmelt runoff* from the Seward Terminal is stormwater covered by the General Permit.[124] Nonetheless, Plaintiffs assert that once Defendants move snow from the dock elsewhere, it is no longer covered due to the presence of an intervening point source—a plow.[125] But as established in Defendants' prior briefings, Defendants' alleged use of a snow plow does not alter the legal status of the snow or snowmelt as stormwater. There is no legal basis for any argument that moving snow, a BMP under the General Permit and Stormwater

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[121] *Orange Env't, Inc.,* 923 F. Supp. at 539.

[122] Defs' Brief at 44-46; *see also* Ashbaugh Decl., Ex. N (Klafka Dep.) at 63:12-19.

[123] Ashbaugh Decl., Ex. JJ (Expert Report of Steven Klafka) at 3.

[124] Plfs' Br. at 45. Plaintiffs' claim that snow-related discharges are only covered by the Clean Water Act during rain events is equally absurd. Plfs' Opp'n Br. at 15. The fact that it may or may not be raining does not impact snow being stormwater under the Clean Water Act. *See* 40 C.F.R. § 122.26(b)(13) (stormwater includes snow melt runoff).

[125] Plfs' Opp'n Br. at 49-50.

Plan,[126] changes snow into something other than stormwater.[127]

B. Snow Removal is Covered by the Stormwater Plan and General Permit.

Plaintiffs' allegation that the Seward Terminal dock is not covered by the Stormwater Plan contradicts their own testimony, as well as the plain language of the Stormwater Plan. The Stormwater Plan expressly identifies the dock and shiploader together as an area where discharges could occur.[128] This coverage is further emphasized in the maps and diagrams of the Seward Terminal within the Stormwater Plan.[129] Indeed, the Sierra Club's corporate witness agreed in her deposition that Drainage Area H includes both the conveyer *and* the loading dock.[130] Moreover, Plaintiffs ignore that the Stormwater Plan contains the BMP that snow is to be managed *within the bounds of the facility* to maximize its treatment in the onsite ponds.[131] The Stormwater Plan and the General Permit thus cover snow removal and all related discharges. Since Plaintiffs concede that they are not claiming any violations of the Stormwater Plan or the General Permit, their claims related to snow removal fail.[132]

C. Dismissal of the Snow Removal Claim is Appropriate as Plaintiffs' Bare Allegations Are Contrary to their Own Testimony and the Weight of the Evidence.

Plaintiffs' evidence regarding snow removal at the Seward Terminal consists solely of one witness's assumptions and statements that contradict both his sworn testimony and that of

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[126] Ashbaugh Decl., Ex. K (Stormwater Plan) at ¶¶ 3.1 and 3.5.4; s*ee also* Defs' Opp'n Br. at 26.

[127] *See* Plfs' Ex. 87, *Evaluation of Snow Disposal into Near Shore Marine Environments*, report prepared for DEC by CH2M Hill (June 2006) at 21 ("collected snow" can be defined as stormwater and covered by a general permit).

[128] *Id.*, Ex. K at 22, AESPROD00022816.

[129] *Id.* at 51-54, AESPROD0022845-0022848.

[130] Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 31:4-11 ("Q: ...based on having read this document [Stormwater Plan], wouldn't you say that Area H includes the conveyor and the loading dock? A: Yes.")

[131] *Id.* at ¶¶ 3.1 and 3.5.4. Plaintiffs' allegation that Defendants do not claim that all snow moved on the Seward Terminal facility is covered by the General Permit is false. As established, snow removal is expressly addressed in the Stormwater Plan and covered by the General Permit.

[132] Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 23:14-17; Ex. HH (ACAT Dep.) at 25:9-19.

Defendants' witnesses.[133] For example, when asked about alleged coal-laden snow being plowed off the Seward Terminal dock, Plaintiffs' witness admitted, "I see them plowing snow into the bay and I'm *just assuming* that there's coal in it, because *I assume* that the coal's falling on the … dock like I've been told, too."[134] Plaintiffs then build their argument on these assumptions, asserting that because at times coal may have fallen onto the dock "when there is snow on the dock… coal and coal dust accumulates on the snow."[135] In fact, there is no proof in the record that coal dust has landed on the snow at any given time.[136] Further, Plaintiffs' witness's later declaration that he has seen snow plowed off the dock on multiple occasions in 2012 directly contradicts his January 31, 2012 deposition testimony.[137] Sham declarations that conflict with sworn deposition testimony cannot be used to defeat summary judgment.[138]

Plaintiffs' allegations are also consistently contradicted by the evidence in this case. In direct response to the assertion that snow is plowed into Resurrection Bay, the AES employee in charge of managing the day-to-day operations of the Seward Terminal facility avers that "[t]his allegation is false."[139] Likewise, in direct refutation of Plaintiffs' sole witness's contradictory statements regarding snow piles reportedly observed at a pond north of the Seward Terminal property and on the beach, Defendants' witnesses testify that they have *never* taken snow from the Seward Terminal and deposited it on areas outside of the Seward Terminal property.[140]

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[133] *See* Defs' Opp'n Br. at 28-34.

[134] Mayberry Decl., Ex. E (Maddox Dep. 133:6-10) (emphasis added).

[135] *See* Plfs' Opp'n Br. at 49.

[136] Stoltz Decl., ¶ 13.

[137] Maddox Decl., ¶ 33; Mayberry Decl., Ex. E (Maddox Dep. 128:2-25 – 129:1-2) (emphasis added); *see also* Defs' Opp'n Br. at 31-32.

[138] *See Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991); *see also Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). *See also* Defs' Opp'n Br. at 31.

[139] Stoltz Supp. Decl. ¶ 3.

[140] Stoltz Supp. Decl., ¶ 2; Farnsworth Supp. Decl., ¶¶ 2-3. Contrary to his declaration submitted to the Court, Plaintiffs' sole witness stated in his deposition "What I have *never* seen is them scooping it up and taking it off the dock and putting it somewhere away from the water [Resurrection Bay]." Mayberry Decl., Ex. E (Maddox Dep. 128:10-13; 38:17-25-39:1).

Snow is placed on appropriate areas of the Seward Terminal and all stockpiled snow on the north end of the Seward Terminal flows south to the facility's settling points – not offsite.[141]

CONCLUSION

For the reasons set forth herein and in Defendants' prior briefs, the Court should grant summary judgment to Defendants and dismiss Plaintiffs' Complaint in its entirety with prejudice.

DATED at Anchorage, Alaska this 2nd day of July 2012.

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[141] *See* Stoltz Supp. Decl., ¶ 4.

CERTIFICATE OF SERVICE

I certify that on this 2nd day of July, 2012, a true and correct copy of the foregoing was served electronically upon the following:

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